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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AMERICAN CIVIL RIGHTS FOUNDATION, a non-profit, public benefit corporation,

Plaintiff,

v.

CITY OF OAKLAND, CALIFORNIA, a political subdivision of the State of California and the PORT OF OAKLAND, a public entity,

Defendants.

CASE NO. CV 07-6058 (JCS)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS (FRCP 12(b)(6))

Date: January 18, 2008
Time: 9:30 a.m.
Courtroom: A
Judge: Hon. Joseph C. Spero

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The American Civil Rights Foundation ("ACRF") asks this Court to invalidate the federally-mandated Airport Concession Disadvantaged Business Enterprise Program ("ACDBE Program") at the Oakland International Airport because ACRF claims that the ACDBE Program conflicts with California Constitution Article I, Section 31, otherwise known as Proposition 209. ACRF alleges that the ACDBE Program, though approved by the US Department of Transportation ("USDOT") pursuant to its regulations, is unconstitutional because it may permit race-conscious criteria to be considered in the selection of Airport concessionaires and the Program does not comply with requirements of federal laws and regulations. As defendants, ACRF names the City of Oakland and the Port of Oakland. But ACRF fails to state a viable claim against either defendant.

As to the City of Oakland, ACRF's claim fails because the City is not involved in enacting or enforcing the ACDBE Program. The Port is an independent department of the City with sole and exclusive responsibility for the ACDBE Program. Accordingly, the City should be dismissed from this action.

As to the City *and* the Port, ACRF's claim is non-justiciable, untimely and, in any event, federal law preempts application of Proposition 209 to invalidate the ACDBE Program. As to Article III justiciability, ACRF fails to plead that any of ACRF's members are concessionaires who have been subject to the Port's ACDBE Program or that would-be concessionaires among its membership have suffered an "injury in fact" due to the ACDBE Program. Nor has ACRF demonstrated that its claim is ripe. ACRF has not pled that the Port has actually applied the objected-to race-conscious provision of the ACDBE Program or enforced its requirements against any party. Nor has ACRF pled any threat of imminent harm so that injunctive and declaratory relief may be appropriate. This is all the more so in that the ACDBE Program and the USDOT approval of the Program is set to expire prior to the hearing on this Motion, so that Plaintiff's request for injunctive relief will be rendered moot.

Second, ACRF's facial challenge is stale. A one-year statute of limitations governs facially constitutional challenges and ACRF did not timely file its challenge. For all of these reasons,

Defendants maintain that ACRF fails to state a claim upon which relief can be given, so that the court should dismiss this Action.

Finally, ACRF's claim fails on the merits because federal law preempts operation of Proposition 209 against federally required airport concessions programs, like the Airport's ACDBE Program.

II. STATEMENT OF FACTS

A. Relevant Facts Regarding the Port and the City

1. The Port of Oakland Generally

The City of Oakland is a charter city. (RJN, Exh. 1, Charter of the City, Ordaining Clause.) Charter cities may create and regulate a sub-government within the city. (Cal. Const. art. XI, § 5(a).) Accordingly, City created the Port as an independent, and self-supporting City department. (RJN, Exh. 2, Charter of the City, Article VII.)

The Board of Port Commissioners ("Board") is the legislative body under the City Charter and has "exclusive control and management of the Port Department." The Board is made up of individuals nominated by the mayor and confirmed by the city council for a term of four years. (RJN, Exh. 2, Charter of the City, Section 701.) Board members serve independently and may be removed only for cause and upon an affirmative vote of a super majority of the council. (RJN, Exh. 2, Charter of the City of Oakland, §§ 703 and 601.) In general the Board is "to have and exercise on behalf of the City all rights, powers and duties" in respect to the Port. (Id. at 706(17).) As a legislative body, the Port "may accept grants or loans of funds made available by the Federal Government or a federal department or agency to aid in financing plans for, or construction of, public works." (See Cal. Gov. Code, § 53701.) In turn, the Port exercises exclusive control and management of the Airport under the Charter. (RJN, Exh. 2, § 717(1).)

2. The Port and City Budgets

On information and belief, the Complaint alleges that "the City receives and benefits from state and local tax monies, which are used, in part, to support and finance the ACDBE Program." (Complaint,¶ 3.) This statement is false.

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As an independent department with the power and duty to establish its own budget under the City Charter, the Port is required to "annually…carefully prepare a budget setting forth the estimated receipts of the Port, and revenue from other sources, for the ensuing year, and the sums of money necessarily required for the administration of the department, and for maintenance, operation, construction, and development of the port and its facilities for the ensuing year, and stating the amount necessary to be raised by tax levy for said purposes." (RJN, Exh. 2, § 715.) Pursuant to Charter Section 716, the Port may "request or provide for the allocation or appropriation to the Port by the [City] Council of any funds raised or to be raised by tax levy or in any manner to be obtained from general revenues of the city."

A statement of the Port's revenues, expenses, and changes in net assets is contained in the "Budget Summary" for each of the identified fiscal years. (RJN, Exhs. 3, FY '05/'06 Port Budget Summary, A-17; 4, FY '06/'07 Port Budget Summary, A-23; 5, FY '07/'08 Port Budget Summary, B.7 to B.8.) No monies from tax revenues or the City are listed in these statements. (Id.)

Separate and independent of the Port's budget, the City's total annual balanced budget for FY 2005/2006 was $941,496,973; for FY 2006/2007 it was $1,0461,641; and for FY 2007/2008 it is $1,066,031,119. (RJN, Exhs. 6, City of Oakland, FY 2005/2007 "Budget in Brief" Summary, D-18; 7, FY 2007/2009 City of Oakland, Adopted Budget, D-14.) Property tax is the City's largest source of revenue in each of the identified fiscal years. (RJN, Exhs. 6, City of Oakland, FY 2005/2007 "Budget in Brief" Summary, D-26; 7, FY 2007/2009 City of Oakland Adopted Budget, D-18 to D-19.)

A summary of each fiscal year's expenditures lists the City funds and programs to receive monies from each funding source. (RJN, Exhs. 6, 2005/2007 City of Oakland Adopted Budget, D-46 to 47; 7, FY 2007/2009 City of Oakland Adopted Budget, D-36 to 39.) The Port is not listed for any of the identified fiscal years. (Id.)

3. The Port's Funding and Operations

The Port of Oakland operates the Airport, which is financially supported by operating revenues. The Port has no taxing powers and receives no tax funds from the City of Oakland. Under the Oakland City Charter, the Port is governed independently from the City by the Board of

Port Commissioners, which has the exclusive control and management of the Port.

The Port receives federal grant funding from the USDOT and the Federal Aviation Administration ("FAA") for airport improvements. (RJN, Exhibits 12-14.) To receive such federal grant funds, USDOT requires the Port, among other grant conditions, to adopt a program to assure non-discrimination by airport concession contractors. (49 CFR Part 23.) The regulation also requires the Port to adopt, race- and gender-based contracting conditions in the award of its airport concession agreements under specified conditions.

B. Apposite Federal Statutory and Regulatory Mandates

Congress has established a public policy to provide airport business opportunities for small businesses owned and controlled by socially and economically disadvantaged individuals ("federal affirmative action requirements").[1] The USDOT and the FAA, through the Airport Improvement Program ("AIP") distribute substantial funds to finance construction projects initiated by state and local governments who own, control and manage airports. (RJN, Exh. 8, Chapters 1 and 2.) To receive federal funding for airport development or authorized projects, an airport must sign grant assurances that it will comply with applicable federal laws, including federal affirmative action requirements. (RJN, Exhs. 8, Chapter 2; 12 to 14.) The USDOT/FAA ensure that airports and their governing bodies comply with federal law through the grant funding agreement process and the FAA's Order 5190.6A, Airport Compliance Requirements. (RJN, Exh. 8.)

In 2005, the USDOT adopted and implemented revised regulations governing airport concession disadvantaged business enterprise ("ACDBE") participation in airport concessions. These regulations are codified as 49 CFR Part 23 entitled "Participation by Disadvantaged

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[1] Specifically, pursuant to 49 U.S.C. § 47107(e)(l), Congress provides that "[t]he Secretary of Transportation may approve a project grant application...for an airport development project only if the Secretary of Transportation receives written assurances, satisfactory to the Secretary, that the airport owner or operator will take necessary action to ensure, to the maximum extent practicable, that at least 10 percent of all businesses at the airport selling consumer products or providing consumer services to the public are small business concerns (as defined by regulations of the Secretary) owned and controlled by a socially and economically disadvantaged individual (as defined in Section 47113(a) of this title)...."

Business Enterprises in Airport Concessions" ("ACDBE Regulations" or "Regulations"). (RJN, Exh. 10.) The objectives of Part 23 are:

- To ensure nondiscrimination in the award and administration of opportunities for concessions by airports receiving USDOT financial assistance;
- To create a level playing field on which ACDBEs can compete fairly for opportunities for concessions;
- To ensure that the USDOT's ACDBE program is narrowly tailored in accordance with applicable law;
- To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as ACDBEs;
- To help remove barriers to the participation of ACDBEs in opportunities for concessions at airports receiving USDOT financial assistance; and
- To provide appropriate flexibility to airports in establishing and providing opportunities for ACDBEs.

(RJN, Exh. 10, § 23.1) The ACDBE Regulations require airport grant recipients ("airport sponsors") to draft and adopt ACDBE programs and submit them to the FAA for approval. (Id., § 23.21.) The Regulations specify measures that grant recipient airports must include in their ACDBE programs to ensure nondiscrimination, including setting goals for ACDBE participation in airport concession opportunities through the use of both race-neutral and race-conscious measures. (Id., § 23.25) The Regulations specify the formula for calculating goals, both race-neutral and race-conscious. (Id., §§ 23.45; 23.51.) USDOT also prepared a sample template for airport grant recipients to follow in drafting and adopting their specific programs. (RJN, Exh. 9.) As stated on the face of that template, "[t]he General Counsel of the Department of Transportation has reviewed this sample program and approved it as consistent with the language and intent of 49 CFR Part 23." (Ibid.)

The ACDBE Regulations require that ACDBE goals be set for all airport concessions awarded. (RJN, Exh. 10, § 23.41(a).) The USDOT regulations specify how an airport expresses, calculates and sets ACDBE participation goals based on the availability of ACDBE's in each of the Airport's concessions markets. (Id., § 23.51.) The Regulations instruct airports to provide the

FAA with the "data, calculations, assumptions, and reasoning in establishing your goals." (Id., § 23.45 (e).) The Port complied with these requirements. (See Complaint, Exh. 2 at 3-9 and also ¶16.)

In implementing its ACDBE program, the airport sponsor must first exhaust race neutral measures to achieve its ACDBE goals. (RJN, Exh. 10, § 23.25(d).) Airport sponsors must also provide for "race-conscious" measures when race-neutral measures, standing alone, are not projected to be sufficient to meet the overall goals. (RJN, Exh. 10, § 23.25(e).)

The USDOT states that "[i]mplementation of the ACDBE program is accorded the same priority as compliance with all other legal obligations incurred by [the airport sponsor] in its financial assistance agreements with the [USDOT]." (RJN, Exh. 9 at 2.) Failure to uphold any of those legal obligations subjects an airport to loss of federal funding. (RJN, Exh. 10, § 23.11 read in conjunction with Exh. 11, 49 CFR Part 26, § 26.101 ["If you fail to comply with any requirement of this part [23 or 26], you may be subject to formal enforcement action . . ., such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied."].)

C. The Port's Federally Mandated ACDBE Program

On several occasions, the Port has applied for and has been granted AIP funding for airport improvements. (RJN, Exhs. 12 to 14.) A term in the grant agreements is that the Port "will comply with all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance and use of Federal funds for this project including but not limited to…49 CFR Part 23 – Participation by Disadvantage Business Enterprise in Airport Concessions." (See, e.g., RJN, Exh. 12, July 21, 2005 DOT/FAA grant agreement at 5, ¶ 17 and Assurance C. "Sponsor Certification" at 1-3.) The Port's Board approved submission of the Program to the FAA for FAA approval. (RJN, Exh. 15.) In preparing its ACDBE Program that is now before this Court, the Port followed the specific mandates, methodologies and formulas of the ACDBE Regulations. (See RJN, Exh. 10 and compare with Complaint, Exh. 1.)

Federal regulations specify the terms and requirements of ACDBE programs. 49 CFR Sections 23.1 and 23.23 set forth the objectives of an ACDBE program and the policy underlying

it. (RJN Exh. 10.) The Port's ACDBE Program sets forth these policies in the Program's policy section. (Complaint, Exh. 1 at 4.) Part 23 defines the terms "socially and economically disadvantaged individual", "concessions" and "race conscious." (RJN, Exh. 10, § 23.3.) The Port's ACDBE participation goals are also calculated and established pursuant to the federal ACDBE Regulations. (RJN, Exh. 10, § 23.51.) The Regulations do not require an airport's goals to be supported by a disparity study. (Id., § 23.51(c).

In following the ACDBE Regulations, the Port's ACDBE Program, as part of its overall multi-year goal, established an 18.7% ACDBE participation goal. (Complaint, Exh. 2 at 1.) Consistent with the ACDBE Regulations, the Port intends to meet its goal through race-neutral means. Only if such means are inadequate does the Port consider race-conscious means to augment ACDBE participation on a contract by contract basis. (Complaint, Exh. 1 at 13-14; Exh. 2 at 7-8.)

The FAA approved the Port's 2006-2008 ACDBE Program and its overall goal on March 24, 2006. (RJN, Exh. 16.) Pursuant to the directive of the FAA, the race-conscious components of the Program terminate on January 1, 2008. (RJN, Exh. 16.)

D. ACRF's Allegations and Claim

ACRF's Complaint alleges as follows:

1. At least one of its members has paid California income tax and real property taxes and assessments on property located within the City, within the last year (Complaint, ¶ 2);

2. The City and Port receive and benefit from state and local monies (¶¶ 3-4). These state and local monies are then used for Port operations, including the Airport, in part to support and finance the ACDBE Program and in part to implement and administer the ACDBE Program (¶¶ 2-4); and

3. The City and Port have a "duty to enforce the California Constitution by not engaging in discrimination or granting preferential treatment on the basis of race, sex, color, ethnicity, or national origin in the operation of public contracting" pursuant to Prop. 209. (¶¶ 3-4.)

ACRF also makes several conclusory allegations regarding the ACDBE Program. ACRF contends that the Program grants preferential treatment to individuals and groups on the basis of

race, sex, color, ethnicity, or national origin and that this Program constitutes a violation of Section 31. (¶ 10.) ACRF also states that Defendants will continue to illegally expend monies in enforcing, implementing and administering the ACDBE Program. (¶ 26.) ACRF further alleges that this Program encourages prime contractors to discriminate. (¶ 24.) ACRF believes that, as designed, implemented and enforced, the Program results in unequal and disadvantageous treatment in the competition for concession contracts. *(Id.)*

ACRF states only one cause of action for violation of article I, Section 31 of the California Constitution. (¶¶ 23-26.) ACRF filed its Complaint in state court. In response to Defendants' demurrer to the Complaint, Plaintiff, for the first time, raised certain federal questions in opposition to the demurrer. As a result, Defendants timely removed the case to federal court and filed the instant Motion.

III. ARGUMENT

ACRF's facial challenge fails because ACRF has not met the Article III justiciability requirements, ACRF's claim is untimely, and ACRF's claim is premised on application of preempted state law.

A. The City Is Not a Proper Party

The City has no responsibility over the Airport or its federally mandated ACDBE Program. The Port is a self-supporting independent department of the City and governs its own internal and operational affairs separate from the City. (RJN, Ex. 2, Charter of the City of Oakland, Article VII.) ACRF thus has incorrectly named the City as a defendant.

In City of Oakland v. Williams, 206 Cal. 315, 320 (1929), the Court interpreted the powers of the Port. In that case, a petition for writ of mandamus was brought to compel the City auditor to certify that funds were available to pay a contractor of the Port. The Court stated that the City Charter "provides for the creation of a board of port commissioners, consisting of five [now seven] members vested with the exclusive control and charge of said harbor, as the successor of all rights and powers formerly exercised by said city, and it is charged with the performance of all the duties formerly imposed upon said city, and is given such legislative and administrative powers as were deemed necessary to enable it 'to promote and more definitely insure the comprehensive and

adequate development of the Port of Oakland through continuity of control, management and operation'." (RJN, Ex. 2, Charter of the City of Oakland, Section 701 and 706.)

The California Court of Appeals later elaborated on the exclusive nature of the Port Commissioners' power over Port operations and Port lands. In Haggerty v. City of Oakland, 161 Cal.App.2d 407 (1958), the Court ruled that the Board of Port Commissioners has the direct power, exclusive of the powers of the City Council, to construct and lease a convention hall in the Port area. In so deciding, the Court held that the "'Port Department' is not only *a* legislative body of the municipality of Oakland , but it is *the* body given exclusive control over port matters". Id. at 414; emphasis added.

Given that the Port is an independent department of the City with sole and exclusive responsibility for the ACDBE Program, the City should be dismissed from the action.

B. ACRF's Proposition 209 Claim Does Not Meet Article III's Justiciability Requirements

As to the City and the Port, ACRF's claim fails under three of the four principles of justiciability. ACRF lacks standing and, at once, presents a claim that is both unripe and moot.

1. ACRF Cannot Establish Standing on the Grounds of a Taxpayer's Suit in Federal Court

Standing is an essential and immutable part of the case-or-controversy requirement of Article III suits. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). To establish standing, plaintiff must have an "injury in fact" that involves "an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Id. at 559-560, 112 S.Ct. at 2136. An interest shared generally with the public at large will not confer constitutional standing. See Hangarter v. Provident Life & Acc. Ins. Co., 373 F.3d 998 (9th Cir. 2004), 1021-1022 [federal standing requirements apply even to action under state law (Calif. Bus. & Prof. C., § 17200) that allows suit on behalf of general public.] Rather, by "particularized," the courts mean that the injury must affect the plaintiff in a personal and individual way. Lujan, 504 U.S. at 560, n.1. In that ACRF's membership has suffered no particularized harm, ACRF, in turn, has no basis upon which to invoke standing on their behalf.

Further, it is well established that a claim is "too speculative" where the proposed harm depends on the occurrence of "contingent future events that may not occur as anticipated, or indeed may not occur at all." Texas v. United States, 523 U.S. 296, 300 (1998). Such is the case at bar.

In an attempt to establish standing in this lawsuit on behalf of itself and its individual members, ACRF alleges that at least one of its members resides and pays taxes in the City of Oakland and that at least one of its members has paid state income taxes and real property taxes on property in Oakland within the past year. (Complaint, ¶ 2.) On information and belief, ACRF also alleges that such taxes, in part, support the Port of Oakland's operations, including the Airport and the "implementation and administration of the ACDBE Program." Absent immediate threat of harm or any proof that the taxpayer's money funded the ACDBE Program, ACRF's taxpayer allegations fail to demonstrate standing for ACRF or its members.

In California, a taxpayer suit may be brought to redress an illegal or wasteful expenditure of public funds or damage to public property, so long as the action involves an actual or threatened expenditure of public funds. See Cal. Civ. Proc. Code § 526a; Humane Soc. of U.S v. State Bd. of Equalization, 152 Cal.App.4th 349, 361 (2007). Such suit, however, is not generally appropriate for primarily political issues or issues implicating the exercise of discretion of either the legislative or executive branches of government. Humane Soc. of U.S., 152 Cal.App.4th at 356; 61 Cal. Rptr. 3d at 281. Moreover, although ACRF alleges that the City and the Port continue to spend local and state monies to implement and administer the ACDBE Program (Complaint, ¶¶ 3-4), such assertions are baseless. The documents judicially noticed herein clearly establish there were no expenditures or threatened expenditures of public tax funds by the Port for any purpose, including the adoption and implementation of the ACDBE Program.

In particular, the City's budgetary documents indisputably show that the City has not provided *any* tax money to the Port in the fiscal years at issue. (RJN, Exhs. 6 & 7.) Simply stated, the Port receives *no* tax monies from the City. (RJN, Exhs. 3 & 4.) Similarly, no tax money is spent on implementing the ACDBE Program at issue. Hence, there is no "actual or threatened expenditure of public funds" that could confer standing upon Plaintiff even in state court.

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More fundamentally, in federal court, the absence of an injury in fact to an individual taxpayer will defeat any claim of standing. In this regard, there has to be something more than a tangential relationship between the taxes paid and the policy being contested for standing to lie. Thus to establish standing in a state or municipal taxpayer suit under Article III, the plaintiff must "set forth the relationship between taxpayer, taxpayer dollars, and the allegedly illegal government activity." Hoohuli v. Ariyoshi, 741 F.2d 1169, 1178 (9th Cir. 1984); see also Cammack, v. Waihee, 932 F.2d 765, 770 (9th Cir. 1991) (holding that the "requirement of a pocketbook injury applies to municipal taxpayer standing as well as to state taxpayer standing.) As discussed further below, none of the members of ACRF could have sued in their own right for want of particularized harm. Absent an injury in fact, plaintiff is also barred from maintaining a viable taxpayer suit and cannot satisfy the threshold for Article III standing.

2. ACRF Cannot Establish Associational Standing so as to Satisfy the Injury in Fact Requisite of Article III

While an organization may sometimes sue on behalf of its members to establish requisite standing under Article III, no such representational standing obtains unless the association satisfies a three-prong test established by the Supreme Court in Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977). The organization must show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted or the relief requested requires the participation of individual members in the lawsuit." Id. at 343. The face of ACRF's Complaint demonstrates that it cannot meet the first two prongs of the Hunt criteria for associational standing.

a. Nothing in ACRF's Complaint Evidences the Requisite Standing of Its Individual Members

Just as ACRF fails to establish a case or controversy based on alleged taxpayer standing, so it fails to demonstrate any nexus between the ACDBE Program and potential, let alone actual, harm to plaintiff's membership singly or collectively. Nowhere in ACRF's Complaint does plaintiff allege that a single member of its organization has been personally affected, economically

impacted or somehow dissuaded from applying for concessionaire work at the Airport. Indeed the Complaint is loudly silent on this issue. Such an omission can hardly be accidental. ACRF is a nonprofit public benefit corporation whose mission is monitoring and enforcing civil rights laws. (Complaint, ¶ 2.) Nowhere does the Complaint allege that its members are would-be concessionaires at the Airport or elsewhere. Plaintiff's silence on this critical fact is a tacit omission that the organization's individual members could not in their own right prove an injury in fact from potential application of the ACDBE Program, so as to satisfy the case or controversy requirement of Article III. If its membership lacks standing, by extension, ACRF lacks standing to sue on their behalf. Associational standing is purely derivative and cannot exist in the absence of standing on the part of the members whose interests an organization represents. Accordingly, ACRF cannot meet the first prong of the Hunt test for establishing standing.

b. Protection of Concessionaire Rights is Not Germane to ACRF's Purpose

Plaintiff nowhere alleges, and Defendants know of no case law which supports the proposition, that an organization can obtain surrogate standing on behalf of a membership where the interest sought to be protected is only tangentially related to the organization's purpose. As discussed above, ACRF does not have a roster of concessionaires among its members, protection of whose interests advances plaintiff's mission. Unlike cases where the second prong of the Hunt test is met because the organization at issue represents individuals whose particular interests are advanced by the actions of the organization, nothing in the Complaint claims a particularized role for ACRF in advancing concessionaire opportunities or protecting the rights of concessionaires.

By contrast, the courts have found associational standing where a challenged minority set aside program does directly implicate the interests of an organization's membership. Such was the case in Associated General Contractors of California v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991) where the court found associational standing under the Hunt test. There, AGCC challenged a public entity's use of racial and gender preferences to remedy discrimination in city contracting. In finding that AGCC met the second prong of Hunt, the court noted that the express interest of AGCC in preserving favorable bidding conditions for its members was "clearly

germane to the organization's purpose." Id. at 1406. This purpose was explicitly stated in AGCC's complaint which stated that "AGCC exists for the purpose, among others, of fostering, promoting, and protecting the common interests of its member contractors and subcontractors in the construction industry in California." Although the court went on to deny AGCC the injunctive relief it sought, it was not for want of standing. By contrast here, nothing in Plaintiff's Complaint demonstrates that its organizational goals are to protect rights particular to its membership with respect to concession-related contract work. Thus, ACRF fails to satisfy the second prong of the Hunt test for representational standing.

3. ACRF' Suit is Not Ripe for Adjudication

The ripeness doctrine prevents premature adjudication or a court's rendering of purely advisory opinions in cases that lack a concrete impact upon the parties. Thomas v. Union Carbide Agricultural Prod. Co., 473 U.S. 568, 580 (1985); Exxon Corp. v. Heinze, 32 F.3d 1399, 1404 (9th Cir. 1994). Whereas standing pertains primarily to whether a party may properly litigate, which Defendants here maintain Plaintiff may not, ripeness addresses *when* that litigation may occur. Lee v. State of Oregon,107 F.3d 1382, 1387 (9th Cir. 1997) The ripeness doctrine derives both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction. National Park Hospitality Ass'n v. Department of Interior 538 U.S. 803, 808 (2003).

More particularly, the ripeness issue addresses two factors: the fitness of the issues for judicial determination and the hardship to the parties of withholding court consideration. With respect to the former, the courts hold that a case "is not ripe where the existence of the dispute itself hangs on *future* contingencies that may not occur" (emphasis provided.) Clinton v. Acequia, Inc., 94 F.3d 568, 572 (9th Cir. 1996). With respect to the latter, the question is whether the parties would suffer any hardship by postponing judicial action. Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967) (overruled on other grounds in Califano v Sanders, 430 U.S. 99 (1977)).

Here, the scope of the controversy is purely conjectural in that no concrete action has been taken that even tangentially impacts Plaintiff or its membership. Moreover, Plaintiff points to no application of the race conscious criteria of which it complains to anyone, whether or not a

member of its organization. Rather, ACRF substitutes conjecture for facts to support its baseless assertions, made on information and belief, that race conscious measures have been actually used in determining concession contracts. (See, e.g., Complaint, ¶¶ 16, 21, 25) Whatever its unsupported and unsupportable beliefs, ACRF points to absolutely no instance, not one, in which a contract under the ACDBE Program was affected by race conscious determinations. Indeed, what ACRF conveniently forgets to note is that the ACDBE Program intended to meet its overall diversity goals "to the maximum extent feasible through race-neutral measures." (Exh. 1, p. 8, ¶ B to Complaint.) Thus, as fully discussed in the ACDBE Program description attached as Exhibit 1 to the Complaint, but which language ACRF fails to address, race conscious measures were to be employed, if ever, if, and only if, race neutral measures proved inadequate. (Exh. 1, p. 14, ¶ C to Complaint.) ACRF has only bald assertions that the potential for such use became a reality. Moreover, the race-conscious components of the ACDBE Program has a sunset provision and is set to expire in just a few weeks, on January 1, 2008. (RJN, Exh. 16.) As such, even assuming arguendo that standing were not an issue, there is little likelihood that ACRF or its members face a threat of imminent harm. Moreover, any opinion the court could render on this matter will be moot by the time it hears argument on the instant Motion.

The law is clear that a claim is "too speculative" where the proposed harm depends on the occurrence of "contingent future events that may not occur as anticipated, or indeed may not occur at all." See Texas v. United States, 523 U.S. 296, 300, 118 S.Ct. 1257, 1259-1260 (1998). Here, the case is not ripe for adjudication because there are no actual facts to support ACRF's claim of a real controversy. For this reason as well, the court should dismiss ACRF's Complaint.

4. As a Matter of Law, ACRF is Not Entitled to Injunctive or Declaratory Relief

As fully discussed, the "injury in fact" test for federal standing requires that a party who seeks relief from the provisions of an allegedly unconstitutional public act must show "actual or imminent," rather than "conjectural or hypothetical" harm from its application. Lujan, 504 U.S. at 560. Where, as here, a petitioner seeks declaratory or injunctive relief, the mere possibility of potential future harm is insufficient to create standing, even when, unlike here, plaintiff has been harmed in the past. Thus, a plaintiff must show "a very significant possibility of future harm in

order to have standing." Bras v. California Public Utilities Com'n, 59 F.3d 869, 873 (9th Cir.1995).

Even assuming standing, however, to obtain injunctive relief, a moving party must demonstrate either a combination of probable success on the merits and the possibility of irreparable harm or that serious questions are raised and the balance of hardships tips sharply in plaintiff's favor. William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86, 88 (9th Cir. 1975) Under either formulation of the test, the party seeking the injunction must demonstrate that it will be exposed to some significant risk of irreparable injury. Caribbean Marine Servs. Co. v. Baldridge, 844 F.2d 668 (9th Cir. 1988). Hence, a plaintiff must do more than allege imminent harm sufficient to establish standing for equitable relief. Injunctive relief requires a threat of demonstrable imminent harm and this ACRF cannot show. Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1201 (9th Cir.1980). For this reason, ACRF is not entitled to the equitable relief it seeks.

C. ACRF's Facial Challenge Is Barred by the One-Year Statute of Limitations

A facial challenge to a statute or ordinance accrues when it is adopted and the statute of limitations for an alleged infringement of constitutional rights is one year. Coral Construction, Inc. v. City and County of San Francisco, et al., 116 Cal.App.4th 6, 26-27 (2004). As plead in its Complaint, ACRF apparently views the Port's adoption of a resolution approving the ACDBE Program and authorizing the Port's Executive Director to submit the program to the FAA for final approval as an exercise of a legislative act subject to a facial constitutional attack. Defendants disagree with this characterization of the Port's action.[2] However, assuming arguendo, that ACRF is correct, ACRF's facial challenge to the ACDBE Program is subject to a one year statute of

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[2] The Port's position is that the resolution adopting the 2006-2008 ACDBE Program constitutes a ministerial, not legislative act. "A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exits." Transdyn v. City and County of San Francisco, 72 Cal.App.4th 746, 751 (1999). The Port's resolution was merely an act implementing a FAA contractual mandate to comply with 49 CFR Part 23. (RJN, Exhs. 15 & 16.)

limitations from the date the legislation was enacted.

The Complaint alleges that "[o]n February 23, 2006, the Port adopted the ACDBE Program." (Complaint, ¶ 10.) Taken as true, for the Complaint to be timely, ACRF would have had to bring its facial challenge to the ACDBE Program within one year of this date or approximately February 23, 2007. ACRF failed to do so. Even assuming that the operative date for the one-year statute of limitations to run was one year from the date the FAA approved the Program, or March 24, 2006, the facial challenge is still too late -- ACRF filed its Complaint on July 6, 2007, well over a year later. Accordingly, Plaintiff's constitutional challenge to the Complaint in its entirety is barred as a matter of law.

D. ACRF's State-Law Claim under Proposition 209 Is Preempted by Federal Law

ACRF contends that Proposition 209 is applicable to the Port's ACDBE Program. But the Port promulgated the ACDBE Program pursuant to the federal regulatory provisions of 49 C.F.R. Part 23. As to the ACDBE Program, Proposition 209 is preempted by those federal regulations. The supremacy clause of the United States Constitution (art. VI, cl. 2) grants Congress the power to preempt state law. See Crosby v. National Foreign Trade Council, 530 U.S. 363, 372 (2000).

While Defendants believe that ACRF's claim is preempted under field- *and* conflict-preemption analysis, Defendants here focus on conflict-preemption. "[W]here Congress has not entirely displaced State regulation in a specific area, State law will still be preempted to the extent that it actually conflicts with federal law." Id. Thus, "[C]onflict pre-emption ... turns on the identification of [an] actual conflict." Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 884 (2000) (internal quotations and citation omitted). There are two reasons courts will find a State law conflict-preempted. First, a State law will be conflict-preempted where it is "impossible for a private party to comply with both state and federal requirements." English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990). Second, State law will be conflict-preempted where that law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

Congressional intent is the "ultimate touchstone" of any preemption analysis, express or implied. Gade v. Nat'l Solid Wastes Management Ass'n, 505 U.S. 88, 96, 98 (1992). In

determining Congressional intent to preempt, a court must "begin with the language employed by Congress and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose," (Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992)), because "[t]he first and most important step in construing a statute is the statutory language itself." Royal Foods Co., Inc. v. RJR Holdings, Inc., 252 F.3d 1102, 1106 (9th Cir. 2001) (citing Chevron USA v. Natural Resources Defense Council, 467 U.S. 837, 842-44 (1984)). As the Court explained in Sprietsma v. Mercury Marine, 537 U.S. 51(2002), the "task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." Sprietsma, 537 U.S. at 62-63.

The Port established its ACDBE Program under the ACDBE regulations, 49 C.F.R. Part 23. The authority for these regulations came from 49 U.S.C. § 47107(e)(l), where Congress articulated its intent: "[t]he Secretary of Transportation may approve a project grant application...for an airport development project only if the Secretary of Transportation receives written assurances, satisfactory to the Secretary, that the airport owner or operator will take necessary action to ensure, to the maximum extent practicable, that at least 10 percent of all businesses at the airport selling consumer products or providing consumer services to the public are small business concerns (as defined by regulations of the Secretary) owned and controlled by a socially and economically disadvantaged individual (as defined in Section 47113(a) of this title)...." In addition, Congress also imposed DBE obligations by statute, 49 U.S.C. §47113.

Part 23, § 23.77(a) explains that a federal grant recipient, as a condition of remaining eligible to receive federal monies, must follow the provisions of Part 23 and, to the extent any State law, regulation or policy relating to ACDBE programs conflicts with Part 23, those State laws, regulations or policies are preempted by Part 23:

> (a) In the event that a State or local law, regulation, or policy *differs from the requirements of this part, the recipient must, as a condition of remaining eligible to receive Federal financial assistance from the DOT, take such steps as may be necessary to comply with the requirements of this part.*
> ...

> (e) However, nothing in this part preempts any State or local law, regulation, or policy enacted by the governing body of a recipient, or the authority of any State or local government or recipient to adopt or enforce any law, regulation, or policy *relating to ACDBEs, as long as the law, regulation, or policy does not conflict with this part.* (Emphasis added.)

The Port's ACDBE Program is a direct result of Congress' intent for airports to implement, at the local level, the federal affirmative action program as set forth in 49 U.S.C. § 47107(e)(l) and 49 C.F.R. Part 23. Section 23.25(e) of Part 23 is in direct conflict with Proposition 209 because the federal regulation requires airports to use race-conscious measures where race-neutral measures alone are not projected to be sufficient to meet ACDBE goals, whereas, the state law allegedly prohibits the use of such race-conscious measures entirely. Accordingly, Part 23 preempts application of Proposition 209 to the Port's ACDBE Program.

IV. CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court grant its motion to dismiss the complaint on the grounds that Plaintiff fails to state an action for which relief can be granted.

DATED: December ___, 2007

Respectfully submitted,

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